

Memorandum**RTD-120**Received2/12/2011

Date: February 10, 2011

To: Mr. Tim Stroshane
California Water Impact Network
639 San Carlos Ave.
Albany, CA 94706

From: Department of Water Resources

Subject: Response to California Water Impact Network and AquaAlliance's Formal Protest of the Department of Water Resources' Petition for Extension of Time Regarding the State Water Project Permitted Water Right Applications 5629, 5630, 14443, 14445A, and 17512

Dear Mr. Stroshane,

This letter is the Department of Water Resources' (DWR) response to the allegations contained in the formal protest filed by the California Water Impact Network (CWIN) and AquaAlliance (AA) (collectively, Protestors) on October 14, 2010.

In the protest, the Protestors contend that granting the petitions would have adverse environmental impacts. To support this contention, the Protestors allege that full application of pumping rates, as found in the permits, would exacerbate the current fishery conditions, full diversions to storage would expand and accelerate adverse impacts to salmonid habitat, pesticides sprayed or used on crops irrigated with State Water Project (SWP) water adversely affect the health of humans and wildlife, and full application of water to the SWP place of use would exacerbate poor water quality conditions, harming open water fish species in the Delta. CWIN and AA also states that granting the petitions would be contrary to the public interest because of negative impacts to communities reliant on salmonid fisheries and agricultural lands in the south Delta. Lastly, the Protestors argue that extending the permits would be contrary to law. According to CWIN and AA, approval of extensions of time for the permits would continue appropriation of water in "cold storage," given the lack of due diligence on the part of DWR to apply the water to full beneficial use. Also, the Protestors state that approval of extensions of time would enable continuing violations of various laws.

For the reasons discussed below, there is good cause for the requested extension period of five years, and that approval 1) will not result in increased environmental impacts, 2) is in the public interest, and 3) is not contrary to law.

1. The Environmental Impacts Alleged By CWIN/AA/AA Should Not Prevent Approval Of The Time Extension

The responses below address CWIN and AA's specific allegations of adverse environmental impacts, and also provide the reasoning as to why the approval of a five-year extension will not result in increased environmental impacts.

A. Approval of the Petition will not result in Adverse Environmental Impacts

In general, DWR disagrees with the Protestors' characterization of the impacts the extensions of time will cause and believes the alleged impacts should not prevent an approval of the time extension.

The Protestors request that the SWP water rights permits proceed to license "for their operations at levels of direct diversion and collection for storage that are consistent with the Public Trust Doctrine, the federal Clean Water Act, California Fish and Game Code Section 5937, the federal Central Valley Project Improvement Act of 1992 Section 3406(b)(1), and California Constitution Article X, Section 2." To support their request, CWIN and AA highlight several environmental impacts caused by SWP operations that will allegedly be increased if the extension of time is granted.

The first environmental impact alleged is that SWP operations are the cause of the pelagic organism decline (POD), and the extension of time will exacerbate the fishery conditions. DWR would first like to express its disagreement with the Protestors' characterization of the SWP as the primary cause of the problems in the Delta and the overwhelming cause of the POD. This view is not supported by science.

The POD studies have not found the circumstances to be as simple as CWIN and AA assert. Instead, the studies suggest that SWP operations have been only one of several causes of the decline. They have also found significant evidence that toxins, invasive species and other changes in the food chain may have been significant contributors to the POD. The relative importance of these factors varies significantly depending on the species, location within the Delta, year and season.

More relevant to the extension of time process, however, is the issue of whether the POD provides a reason to deny the extension of time request and proceed to license. DWR believes that reconsideration of its water rights permits at this time, to the extent that would occur in a licensing process, is not warranted because other regulatory processes are currently underway to address issues related to the POD and the overall condition of the Delta.

Currently, DWR is operating under the constraints imposed by the Biological Opinions (BO) issued by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service for the protection of delta smelt and salmonid species, respectively. Water Rights Decision 1641 (D-1641) requires DWR to protect beneficial uses for fish in the Delta; and, as recognized by D-1641, DWR is required to meet objectives that protect fish and wildlife through compliance with federal and state Endangered Species Acts. As such, DWR's permitted operations, i.e., its diversions for use and storage, have already been modified to implement the BOs.

In addition to the BOs, there are several planning processes underway that are intended to address fishery issues and the overall condition of the Delta, and will ultimately affect and modify DWR's permitted operations. First is the State Water Board's own process to review and modify the 2006 Water Quality Control Plan for the

San Francisco Bay/Sacramento-San Joaquin Delta Estuary (2006 Bay-Delta Plan). This process will address many of the issues in the Delta, and may result in changes to the 2006 Bay-Delta Plan and potentially SWP water rights.

In both its water quality and environmental review processes, the State Water Board will also consider information developed in other Bay-Delta related processes. One of those processes is the Bay Delta Conservation Plan (BDCP). The purpose of the BDCP process is to develop long-term measures to recover and restore at-risk species, primarily fisheries, in the Delta, while improving water supply reliability. DWR and the federal lead agencies are preparing a joint Environmental Impact Statement (EIS)/Environmental Impact Report (EIR) for the BDCP. The BDCP EIS/EIR will include analyses of the environmental impacts of improved water conveyance infrastructure for the SWP and the Central Valley Project (CVP), and other habitat conservation measures that will be developed to advance the goals and objectives of the BDCP. Implementation of the BDCP will likely require changes to the 2006 Bay-Delta Plan and water rights implementing that plan. The State Water Board's review of the Bay-Delta Plan and its implementation and preparation of environmental documentation for this project will proceed concurrently with preparation of the BDCP EIS/EIR.

In light of the above processes, DWR contends that, at this time, proceeding to license and/or modifying DWR's permits to add terms and conditions to protect fish in the Delta would be premature and is not needed to protect the public trust. DWR's operations have already been modified to protect delta smelt and salmonid species by the BOs and will continue to be modified as the State Water Board's process to review and modify the 2006 Bay-Delta Plan moves forward and as the BDCP is completed and implemented.

CWIN and AA also claim that full application of contributions to surface or ground water storage in the Sacramento Valley as allowed by the SWP water rights permits will accelerate diminished salmonid habitat conditions caused by dam construction and operations. First, DWR again takes issue with the general and unsubstantiated claim of adverse impacts that will result if approval of the time extension occurs. The Protestors provide neither facts nor rationale to explain why increasing diversion to storage, in compliance with the current regulatory regime, will result in the impacts CWIN and AA claim.

Second, DWR believes the impacts to salmonid habitat from Oroville facilities and operations are being sufficiently addressed through the Federal Energy Regulatory Commission's (FERC) Oroville Relicensing process. DWR filed a license application with FERC for a major new license to continue to own, operate, and maintain the Oroville Facilities on January 26, 2005. The 2005 application included a preliminary draft environmental assessment.

DWR filed a comprehensive Offer of Settlement (Settlement Agreement) with FERC on March 24, 2006, which replaces the Proposed Action outlined in the license application. The terms of the Settlement Agreement include a wide range of

measures described in Proposed Articles A100 through A135. The agreement also includes a set of measures that DWR proposes to implement outside of the project license. Under the Proposed Action, DWR would implement six programs designed to enhance habitats for coldwater fisheries to benefit the threatened and endangered Central Valley spring-run Chinook salmon and Central Valley steelhead in the Feather River and warm water fisheries in Lake Oroville. These programs include expanding and enhancing habitat, and operating under new, more stringent, flow and temperature requirements. The flow objectives will be implemented with the new license while the temperature objectives will be implemented after a number of steps are taken because facility modifications will be necessary.

DWR believes that the Proposed Action appropriately balances all interests and resources related to the operation of the Oroville facilities. DWR further believes that the measures set forth in the Proposed Action meet and exceed all public interest requirements of the Federal Power Act and other statutory and regulatory requirements pertaining to the operation of these facilities. Thus, other than issuing a 401 Certification, the State Water Board should not take action regarding the operation of the Oroville facilities at this time.

The third claim of adverse environmental impacts included in the protest deals largely with pesticide use. CWIN and AA claim that pesticides sprayed or used on crops irrigated with SWP water adversely affect the health of humans and wildlife. DWR believes this claim is irrelevant as to whether the State Water Board should approve the request for an extension of time. DWR is a wholesaler of water, it does not control how, and to what extent, individual farmers choose to apply pesticide. In addition, pesticides and their use are already heavily regulated by other entities, laws and regulations. Put simply, an extension of time process is not the proper forum to address pesticide use on agricultural lands.

The final claim of adverse environmental impacts deals with the southern Delta salinity water quality objectives contained in D-1641. CWIN and AA claims that full application of water to the SWP's permitted places of use would exacerbate the poor water quality conditions in the southern Delta and would hasten the destruction of open water fish species native to the Delta.

The above claim is baseless and factually incorrect for two main reasons. First, full application of water to SWP's places of use would not exacerbate the salinity conditions in the southern Delta. As DWR has demonstrated on numerous occasions before the Water Board, SWP operations do not contribute to or exacerbate salinity levels in the southern Delta. In addition, the SWP does not provide water to any entity known to contribute to drainage or salinity issues in the San Joaquin River and the southern Delta. Second, the salinity objectives were designed and intended to protect agricultural uses. There is no evidence that DWR is aware of to suggest that Electrical Conductivity at or slightly above the levels called for in D-1641 are harmful in any way to the native fish species of the Delta.

B. The Environmental Impacts Alleged By the Protestors Will Not Increase if the Time Extension is Approved

DWR's plan for projected, long-term SWP Delta operations is being developed in the BDCP process. Until the BDCP is completed, projections of future SWP operations (including diversions and use) and potential impacts would be very speculative. As such, the extension period that DWR requested is to allow time for the BDCP to be completed and a Final EIR/EIS to be issued. Regarding project operations during the extension period, the projected operations under the current regulatory regime will not exceed historical maximum rates of diversion and annual maximum diversions.

The primary activity that will address the current uncertainty and, ultimately, provide a realistic projection of future SWP operations is the BDCP process. The BDCP will provide the basis for SWP and CVP compliance with the state and federal endangered species acts and the Natural Community Conservation Planning Act. The BDCP will result in systemic changes in SWP and CVP conveyance infrastructure as well as restoration and enhancement of ecological resources. The outcome of the BDCP is expected to result in more long-term regulatory stability for the SWP. It will support the issuance of take permits from the US Fish and Wildlife Service (USFWS), the National Marine Fisheries Service (NMFS) and the state Department of Fish and Game (DFG). The BDCP is expected to have a significant impact on project operations. Program documents will include an EIR/EIS analyzing the potential impacts of project operations and the restoration and enhancement efforts. The current BDCP schedule projects a final BDCP and EIR/EIS by the end of 2012. Following completion of the BDCP process, however, DWR will be able to more accurately predict future allowable diversions from the Feather River and Delta. DWR thus limited the scope of the current petition to a short term extension of only five years to allow for the BDCP to be completed and a final EIR/EIS issued.

Limiting the current time extension request to five years also allows DWR to reasonably predict and evaluate future operations for the period of the extension. DWR published its most recent delivery reliability report in August 2010, *The State Water Project Delivery Reliability Report 2009* (2009 Report). The 2009 report evaluates the ability of the SWP to deliver water to its contractors under existing conditions (D1641 and current Biological Opinions). The report projects that under current hydrology and regulatory restrictions, maximum SWP deliveries will be less than 3.4 million acre-feet, which is less than the maximum historic SWP deliveries. Because of the limited term of the extension, it is reasonable to expect that the water rights terms and conditions and regulatory restrictions will not change substantially before the end of 2014. Consequently, the current conditions analysis in the 2009 Report is a reasonable estimate of the level of deliveries during the period of the requested extension. If DWR were to instead proceed to license, DWR would expect to continue to operate under the same terms and conditions and regulatory restrictions. Continued operation up to maximum historic rates and annual maximum diversions (license case) is thus the baseline against which the current project will be assessed.

DWR recognizes that full beneficial use under the listed permits will not be reached in the next five years and that additional time will be required to reach full beneficial use. However, since the BDCP will offer the best opportunity to provide a realistic projection of future, long-term SWP operations, good cause exists to extend DWR permits until the BDCP is completed. At the end of the extension period, DWR anticipates filing for a longer term time extension and will comply with the California Environmental Quality Act (CEQA) for any petition filed at that time.

Importantly, during the period of the five year extension, DWR will continue to divert and redivert water to direct use and storage in accordance with the terms and conditions of its permits, as well as any additional regulatory restrictions imposed on the SWP through D 1641 or the Biological Opinion for the SWP.

2. Approval Of The Extension Of Time Is In The Public Interest

CWIN and AA state that the alleged environmental consequences of the approval of the extension of time would result in adverse impacts on communities depending on salmonid fisheries and agricultural lands in the south Delta. As such, the Protestors argue, the petitions for extension of time are not in the public interest.

As discussed in section 1 above, DWR disagrees that approval of the extension of time will result in the adverse impacts claimed by the Protestors. DWR thus also disagrees with Protestors' contention that the extension of time is not in the public interest. Instead, allowing the BDCP to be completed before requesting a long-term time extension or proceeding to license is both reasonable and in the public interest.

3. Approval Of The Extension Of Time Is In Compliance With The Law

CWIN and AA provides three reasons for why granting the petitions at issue would be contrary to law. The following addresses those three reasons in turn.

A. Approval of the Extensions of Time Would Not Result in "Cold Storage"

CWIN and AA claims that DWR has not diligently pursued development of the SWP water supply and thus approval of the time extensions would cause the water to remain unused, which is contrary to California water law. This type of situation alleged by CWIN and AA is often referred to as "cold storage."

The requested time extensions are not counter to California water law and would not result in "cold storage." To argue otherwise both ignores the history of the SWP and the work DWR has done to put water to beneficial use, and misunderstands why DWR has not been able to divert and re-divert more water for use in the SWP service area. Once DWR obtained the appropriate authorizations, including its water rights permits, it diligently constructed the SWP, completing most of the major facilities by the early 1970s. DWR has also been diligent in putting the water to beneficial use. Since the SWP began operating, there has been a steady increase in SWP diversions and deliveries, matching the increased demand in the SWP service area. It has only been

recently, that DWR deliveries have not continued to increase (when the water is available). The leveling off (or decrease) of SWP diversions and deliveries, however, is not the result of lack of facilities or demand. Instead, the steady or declining diversions are the direct result of new and increased regulatory constraints. Even in this new regulatory regime, DWR is pursuing development of its water supply. As described above, one of the BDCP's purposes is to develop and analyze an alternative method to convey water through the Delta that will both provide a reliable water supply and be protective of the Delta environment. Thus, the requested time extension is well supported and is in the public interest.

Moreover, DWR's inability to make full use of its water rights permits does not result in the "cold storage" of water rights. As described in Order WR 2008-0045, "cold storage" means a "situation in which an appropriation is initiated, so that the water that is subject to appropriation is not available to other parties who could potentially put it to beneficial use, but the appropriator is not diligently pursuing development of that water supply, so the water remains unused, contrary to the public interest." (Order WR 2008-0045 at 1-2.) Here, DWR is pursuing the development of its water supply, but recent and increasing regulation is causing DWR to forego large quantities of water that otherwise it would have diverted and put to use. The fact that DWR cannot divert water because of regulations does not equate to a lack of diligence.

Except during excess conditions, the water that DWR must forego is not remaining unused. Instead, consistent with DWR's current permits and other regulatory obligations, the flows are being used to protect various beneficial uses within the Feather and lower Sacramento Rivers and the Delta which is also an authorized use of water under DWR's permits. In other words, the water DWR does not divert is not being abandoned or wasted, instead it is actively being managed to protect beneficial uses such as fish and wildlife.

B. Unsubstantiated Allegations of Violations of Various Laws Are Not Grounds for Denial of the Time Extensions

The Protestors' second reason as to why granting of the petitions would be contrary to law deals with general and unsubstantiated allegations of violations of several laws. In the absence of a specific example, DWR finds it difficult to respond other than it disagrees with this contention. DWR is unaware of any violations to the federal Clean Water Act, the Porter-Cologne Water Quality Control Act, Fish and Game Code section 5937, the public trust doctrine, and the California Constitution, Article X, Section 2 that will be caused by the extensions of time.

CWIN and AA appear to be arguing that the SWP's operations as a whole are counter to the various laws. DWR does not agree with such allegations but if the Protestors believe such claims should be pursued, then the time extension process is not the appropriate forum for such complaints. As stated in Order WR 2001-02, "a petition for extension of time does not necessarily entail reevaluation of the underlying water right. Rather, in reviewing a petition for extension of time, only those changes that will take place if the petition is granted should be considered." (Order WR 2001-02 at 6.) In

this case, DWR does not expect an increase in historical maximum diversions during the time period requested and thus there should not be changes caused by approval of the time extensions. As such, CWIN and AA's general complaint of SWP operations is not appropriate in the time extension context.

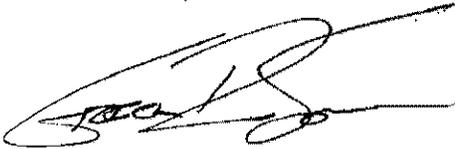
C. DWR Will Comply With the California Environmental Quality Act

DWR is currently conducting an environmental review process in compliance with CEQA. As stated above, continued operation up to maximum historic rates and annual maximum diversions (the license case) is the baseline against which the current project will be assessed.

DWR appreciates CWIN and AA's interests in the extension of time process and hopes that the above information addresses the concerns raised in the protest letter.

If you have any questions regarding DWR's responses, please contact me at (916) 653-8826 or esoderlu@water.ca.gov.

Sincerely,



Erick Soderlund
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